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ABSTRACT

An examination of the laws governing commercial speech protection and alcoholic beverage advertisements, this document details the legal precedents for and implications of banning such advertising. An introduction looks at the current amount of alcohol consumed in the United States and the recent campaigns to have alcoholic beverage ads banned. Following a section about the role of the Federal Trade Commission (FTC), a third section examines how the Commercial Speech Doctrine developed, listing a number of pertinent legal cases from 1942 to the present day. The fourth section focuses on how Commercial Speech applies to the alcoholic beverage industry, citing specifically "Dunagin v. City of Oxford, Mississippi" and "Capital Cities Cable, Inc. v. Crisp." The section also contains a four-part strict scrutiny test as a probable method of analysis should the court review the First Amendment question regarding alcoholic beverage advertising, which includes the notions that (1) despite youth-oriented alcohol ads, the FTC and the Bureau of Alcohol, Tobacco, and Firearms already prohibit false, misleading, and deceptive advertising, and consuming alcohol is a lawful activity; (2) the court must decide if there is a substantial government interest involved; (3) regulation of ads might not advance government interest; and (4) any regulation must not be more extensive than necessary to advance that interest. A summary suggests that industry self-regulation may be more effective than an advertising ban. (JC)

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COMMERCIAL SPEECH PROTECTION AND ALCOHOLIC BEVERAGE ADVERTISING

by

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COMMERCIAL SPEECH PROTECTION
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In 1983, the estimated annual per capita consumption of pure alcohol in the United States was about 2.75 gallons, which computes to just under one ounce a day, or about two drinks.[1] Some studies suggest that this type of drinking behavior, considered moderate, results in a reduced risk of ischemic heart disease.[2] However, per capita consumption is an average across the adult population, and does not reflect the drinking behaviors of all Americans. Surveys indicate that one-third of Americans abstain from drinking alcoholic beverages, while another third reports drinking less than three drinks a week. Thus, 95% of the alcohol consumed is limited to one-third of the population, with five percent of the population drinking more than half of all alcohol consumed in the United States.[3] The excesses of alcohol use have prompted citizen groups to campaign for increased law enforcement, stricter penalties for alcohol-related crimes and educational programs to help curb abuse.

Over the past decade, a new frontier for attack against alcohol abuse has emerged. The multimillion dollar business of alcoholic beverage advertising is currently under scrutiny by Mothers Against Drunk Drivers (MADD), as well as Project SMART (Stop Marketing Alcohol on Radio and Television),[4] which in 1983 began its campaign to end the broadcast of

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[1] S. Olson, Alcohol in America: Taking Actions to Prevent Abuse, Washington, D.C.: National Academy Press 13 (1985).

[2] Id. at 19.

[3] Id. at 13.

[4] "Groups take aim at alcohol ads on TV and radio" Broadcasting 73 (November, 1983).

alcholic beverage ads. Because the Twenty-first Amendment limits the power of the Federal government in regulating the alcoholic beverage industry, a Federal ban could only affect the broadcast media, since the airwaves are controlled by the Federal government. This paper will argue that such a ban would be unconstitutional under the First Amendment.

Regulators of Alcoholic Beverage Advertising

The Twenty-first Amendment grants states the power to regulate the alcoholic beverage industry within state borders. Already, certain states, including Oklahoma, Mississippi, and Utah, have banned alcoholic beverage advertising originating in the state.

Federal agencies govern certain actions of the industry; namely taxation, interstate commerce, and to a degree, advertising. The Federal Trade Commission, the government agency primarily responsible for regulating advertising content, prohibits unfair and deceptive marketing practices.[5] The F.T.C. has adopted a laissez-faire attitude toward alcoholic beverage advertising, recommending regulation by the Bureau of Alcohol, Tobacco, and Firearms.[6]

The B.A.T.F. issues permits for interstate traffic in distilled spirits, wines, and malt beverages, protects the tax revenue, and enforces postal laws with respect to alcoholic beverages.[7] The Bureau also prohibits false and misleading advertising of alcoholic beverages.[8] Currently, the

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[5]U.S. Code Title 15, Section 55 (1982).

[6]"FTC brings cheers to alcohol marketers" Advertising Age 14 (April 22, 1985).

[7]U.S. Code Title 27, Section 205 (1982).

[8]Id. at Section 205 (f).

B.A.T.F. is awaiting a legislative decision regarding petitions delivered to Congress by Project SMART.[9]

The Federal Communications Commission has authority with respect to interstate and foreign commerce in communication. It is empowered to deny license renewal for broadcast stations which may breach established advertising codes.[10]

The Development of the Commercial Speech Doctrine

The constitutional protection of commercial speech has evolved considerably in the last half-century. In 1942, the Supreme Court held in Valentine v. Chrestensen that advertising was not entitled to First Amendment protection. In this case, the advertising was a handbill distributed to bring customers to a private citizen's submarine, on display in the New York harbor. The City sanitation authorities prohibited the distribution of advertising handbills, but not those that delivered a political message. Attempting to circumvent the regulations, the advertiser printed a protest of dock fees on the reverse side of the handbill. The Court noted that, given a rational claim that advertising in the form of handbills created a litter problem, free speech was not denied, but regulated in a reasonable manner.[11]

In 1964, the Supreme Court took another look at commercial speech, although indirectly, in New York Times v. Sullivan. This was a libel case,

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[9]"FTC brings cheers to alcohol marketers" Advertising Age 14 (April 22, 1985).

[10]47 U.S.C.A. 307 (1962).

[11]Valentine v. Chrestensen, 316 U. S. 52 (1942).

and involved a full-page ad soliciting funds for southern Negroes in civil rights causes. Noting this case concerned political speech, the Court ruled that the expression did not lose protection simply because it appeared as a paid advertisement.[12]

Five years later, commercial speech faced a new test when the F. C. C. declared cigarette advertising to be "controversial speech" and subject to the F. C. C.'s fairness doctrine, allowing air time for opposition to cigarette smoking.[13] This case, Banzhaf v. F. C. C.,[14] and its implementation brought about public awareness regarding the dangers of smoking, and ultimately reduced cigarette consumption.[15] The tobacco industry, realizing the effects of the anti-smoking media campaign, offered little resistance, if not encouragement, for a complete broadcast ban of cigarette advertising.[16]

The broadcast advertising ban of cigarettes may have saved the tobacco industry, but the broadcast industry suffered a considerable loss of revenue, and challenged the ban on First Amendment grounds. In Capital Broadcasting Co. v. Mitchell, a U. S. District Court determined that Congress had the power to supervise regulatory agencies, in this case, the

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[12]New York Times v. Sullivan, 376 U. S. 254 (1964).

[13]Communications Act of 1934. 47 U. S. C. A. 307 (1962).

[14]Banzhaf v. F. C. C. 405 F. 2d. 1082 (D. C. Cir. 1968).

[15]Wuliger "The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban" 36 Fed. Comm. L. J. 19 (1984).

[16]Public Health Cigarette Smoking Act of 1969, Public Law 91-222, 91st Cong., 2d. Sess., 84 Stst. 87, approved April 1, 1970.

F. C. C.[17] Noting that "product advertising is less vigorously protected than other forms of speech",[18] the court found no infringement of First Amendment rights, since the petitioners were not prohibited from disseminating information about cigarettes, only from collecting revenue for the broadcast.[19] In his dissenting opinion, Circuit Judge Skelly Wright argued that it seemed unfair to apply the term "controversial speech" for the fairness doctrine, yet, "product advertising" for the purposes of the First Amendment.[20]

In 1973, the Supreme Court began outlining qualifications for commercial speech protection in Pittsburgh Press Co. v. Human Relations Commission. Here, the Court ruled that employment advertising appearing under a sex-designated column heading was not protected speech because sex discrimination in hiring is an illegal activity.[21]

Commercial speech gained some protection in 1975, in Bigelow v. Virginia,[22] which involved a newspaper advertisement in Virginia for abortion services available in New York. The Supreme Court held that speech was "not stripped of First Amendment protection" merely because it appears in the form of commercial advertisement.[23] As in Pittsburgh Press, the

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[17]Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D. C. C. 1971).

[18]Id. at 584.

[19]Id.

[20]Id. at 592.

[21]Pittsburgh Press Co. v. Human Relations Commission, 413 U. S. 376 (1973).

[22]Bigelow v. Virginia 421 U. S. 809 (1975).

[23]Id. at 818.

Court first looked at the legality of the action, and finding abortion legal, further determined that the ad was not deceptive or fraudulent. Finally, the Court noted that the state of Virginia did not establish a substantial interest in controlling abortion advertising, citing that Virginia was trying to regulate what Virginians may read or hear about, in clear violation of the First Amendment.

The following year, commercial speech received yet another boost in Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,[24] which involved the advertising of drug prices. The Court found that drug price advertising was not false or misleading, and did not involve an illegal transaction. The Court also established a substantial state interest, that of maintaining professionalism among pharmacists, but suggested that the interest could be served in other ways. Time, place, and manner restrictions on drug advertising were recommended as a way of serving the significant government interest.

In 1977, in Carey v. Population Services International,[25] the Supreme Court found contraceptive advertising to be protected commercial speech, and again suggested the use of time, place, and manner restrictions "designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young."[26]

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[24]Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748 (1976).

[25]Carey v. Population Services International, 431 U. S. 678 (1977).

[26]Id. at 712.

By 1980, guidelines for commercial speech protection were well-rooted. Central Hudson Gas and Electric Co. v. New York Public Service Commission[27] solidified the commercial speech doctrine, drawing on the opinion in United States v. O'Brien. O'Brien, a draft card burner, challenged the courts regarding his right to freedom of expression. The Supreme Court, citing the need for an effective Selective Service System, denied O'Brien's right to First Amendment protection, adding that, once a substantial government interest is established and considered advanced by regulation of speech, such regulation may be no greater than is necessary to further that interest.[28]

During the energy crisis of the early 1970s, the New York Public Service Commission banned all advertising promoting the use of energy. When the fuel crunch subsided, the Commission extended this ban, citing public support. In Central Hudson Gas and Electric Co. v. New York Public Service Commission, the Supreme Court employed a four-part test, known as the "strict scrutiny" test,[29] to determine First Amendment protection of commercial speech:

> For commercial speech to come within that protection, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the goverment interest asserted, and whether it is not more extensive than necessary to serve that interest.[30]

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[27]Central Hudson Gas and Electric Co. v. New York Public Service Commission, 447 U. S. 557 (1980).

[28]U. S. v. O'Brien, 391 U. S. 367 (1968).

[29]The test has also been referred to as the "substantial interest" test.

[30]Central Hudson at 566.

In Central Hudson, the court noted the "absence of a showing that more limited speech regulation would be ineffective," therefore finding the ban to be too extensive, and suggesting a more limited restriction on advertising content.[31]

The next year, another commercial speech case came to the Supreme Court in Metromedia v. City of San Diego.[32] Here, the problem was a city ordinance banning outdoor advertising displays. Using the four-part test from Central Hudson, the Court affirmed parts one, two, and four. However, noting the city's legitimate interest of improving traffic safety and aesthetics, the Court failed to acknowledge that the ordinance would directly advance that interest, since the city permitted billboards displaying non-commercial messages. In a separate concurring opinion, Justices Brennan and Blackmun felt the city did not empirically prove that the ordinance advanced the purported interest of reducing traffic accidents due to billboard distractions.[33]

In two recent cases, the Court was unable to establish substantial government interest in banning the advertising of contraceptives in Bolger v. Youngs Drug Products Corp.,[34] and legal services in Zauderer v. Office of Disciplinary Counsel.[35] The court rejected arguments that intrusion and invasion of privacy were substantial government interests, noting that the offensive nature of the advertising does not justify its suppression.

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[31] Id. at 571.

[32] Metromedia v. City of San Diego, 453 U. S. 490 (1981).

[33] Id. at 508.

[34] Bolger v. Youngs Drug Products Corp., 463 U. S. 60 (1983).

[35] Zauderer v. Office of Disciplinary Counsel, 471 U. S. 626 (1985).

Most recently, in a 5-4 decision, the Supreme Court upheld an advertising ban on casino gambling in Puerto Rico in Posadas de Puerto Rico v. Tourism Company of Puerto Rico.[36] Applying the traditional tests first, the Court found casino gambling to be a legal activity, and the advertising not false or misleading. Then the Court used the Central Hudson test to find that the government's interest--protecting the "health, safety, and welfare" of Puerto Rican residents --in regulating the advertising had been established.[37] The Court also held that the ban furthered the government interest by discouraging Puerto Rican residents from excessive gambling, and was not more extensive than necessary.[38] Dissenting Justice Brennan expressed the view that the Court simply "tipped its hat" to strict scrutiny standards, without requiring evidence of the substantiality of the government's interest.[39] Indeed, the Court appears to have used the older "mere rationality" test from pre-1940s due process decisions.

Commercial Speech and the Alcoholic Beverage Industry

Two lower court decisions involving state bans of alcoholic beverage advertising possibly have laid the foundation for a federal broadcast ban. Interestingly, as in Capital Broadcasting, the media, not the product industry, raised the First Amendment question in both cases. But because

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[36]Posadas de Puerto Rico v. Tourism Company of Puerto Rico, ___ U. S. ___, 106 S. Ct. 2968 (1986).

[37]Id. at 2971.

[38]Id.

[39]Id. at 2983. J. Brennan dissenting, joined by J. Marshall and Blackman. J. White wrote a separate dissenting opinion, also joined by J. Marshall and Blackman.

two separate media were involved (broadcast and print advertising), the courts viewed the cases differently.

In 1983, the Fifth Circuit U. S. Court of Appeals reaffirmed the strict scrutiny test as the method of deciding commercial speech cases in Dunagin v. City of Oxford, Mississippi,[40] which involved print advertising of liquor. Finding liquor advertising involved a legal activity and was not false or misleading, the court accepted the state's asserted interest of "safeguarding the health, safety, and general welfare of its citizens by controlling the artificial stimulation of liquor sales and consumption created by the advertising of liquor."[41] Establishing that the state interest was advanced by the ban, the court noted that advertising's purpose was to increase sales of their brands, but inadvertently would increase total sales. The court did not require scientific evidence that liquor advertising increases sales.[42] The court did not find the advertising ban to be too extensive because advertising, except those ads which might encourage excessive consumption, was allowed inside drinking establishments.[43] The Supreme Court declined to review the case.

In 1984, in Capital Cities Cable, Inc. v. Crisp,[44] cable broadcasters challenged an Oklahoma law requiring alcoholic beverage advertisements to be deleted from broadcasts before transmission into the state. The Supreme

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[40]Dunagin v. City of Oxford, Mississippi, 718 F. 2d. 738 (CA5 1983) (en banc), cert. denied, 104 S. Ct. 3553 (1984).

[41]Id. at 747.

[42]Id. at 750.

[43]Id. at 751.

[44]Capital Cities Cable, Inc. v. Crisp, 467 U. S. 691 (1984).

Court was given an opportunity to address the First Amendment issue, but instead, relied on the pre-emption doctrine of the F. C. C.,[45] which mandates that cable broadcasts must be aired in full, without deletion or alteration. This ruling allowed alcoholic beverage advertising on cable television stations to be broadcast in Oklahoma, although locally-oriented advertising continued to be banned.

Although the 1986 ruling in Posadas related to gambling rather than alcohol, it also may have cleared the path for a broadcast ban of alcoholic beverage advertising, should Congress or any federal agency decide to enact prohibitive statutes.[46] Given that approximately $685 million is spent annually by the alcoholic beverage industry for broadcast advertising,[47] it is likely the media would challenge any ban on First Amendment grounds. Should the Court have an opportunity to address the issue, it may approach it either by using federal pre-emption or the Central Hudson guidelines. The decision in Capital Broadcasting acknowledges that Congress has the power to supervise the F. C. C., which regulates interstate commerce with respect to communication. However, as discussed earlier, commercial speech has gained considerable protection since this case was decided in 1971. The 1976 opinion in Virginia Pharmacy noted that the flow of commercial speech was necessary to preserve a "predominantly free enterprise economy."[48] Furthermore, in Central Hudson, the Court adopted the strict scrutiny test

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[45]47 C. F. R. 76.55 (b).

[46]Washington Post, July 2, 1986, A1a.

[47]"Groups take aim at alcohol ads on TV and radio" Broadcasting 73 (July 2, 1984).

[48]Virginia Pharmacy at 765.

to examine efforts to ban commercial speech when it is for a legal product and is neither false or misleading.

Therefore, should the court review the First Amendment question regarding alcoholic beverage advertising, the probable method of analysis would be the four-part strict scrutiny test, as outlined below:

Part One. Alcohol consumption is a lawful activity, although advocates of an advertising ban insist that some of the ads target youth, including those under legal drinking age.[49] But in Carey, the Court expressed the view that contraceptive advertisements did not "legitimize sexual activity of young people."[50] Similarly, alcohol advertising does not legitimize underage consumption.

Advertising codes within the alcoholic beverage industry discourage advertising and marketing strategies which suggest youth consumption, overindulgence, and dangerous uses of alcohol.[51] Additionally, the F. T. C. and the B. A. T. F. already prohibit false, misleading, and deceptive advertising, but as yet, have not recognized a definitive need for enforcement.[52]

Part Two. Finding that alcoholic beverage advertising concerns a lawful activity and is not false or misleading, the court must next determine a substantial government interest in regulating speech. As in

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[49] M. Jacobson, R. Atkins, and G. Hacker, The Booze Merchants, Washington, D. C.: C. S. P. I. Books 49 (1983).

[50] Carey at 701.

[51] Jacobson, Atkins, and Hacker at 10-11.

[52] Id.

Dunagin and Posadas, the "health, safety, and welfare" of citizens constitutes a substantial government interest, in this case, by discouraging alcoholic beverage consumption. In previous efforts to ban commercial speech, the government failed to establish a substantial interest in prohibiting advertisements for contraceptives[53] and legal services.[54] But researchers estimate that more than 80,000 deaths each year are due to alcohol abuse, while alcohol-related health costs may reach $30 billion. These costs, in money as well as lives, seem to warrant government interest.[55]

Part Three. If both inquiries yield positive answers, the court must decide if the regulation directly advances the asserted government interest. In Dunigan, the court noted that "It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales without expected results, or continued without realized results."[56] In contrast, industry advertisers maintain that promotions "are intended solely to shift current drinkers from one brand to another."[57]

The broadcast ban of cigarette advertising resulted in a surge of print and direct mail advertising, ultimately increasing sales.[58] Also, the removal of broadcast cigarette ads meant the removal of anti-smoking

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[53]Bolger v. Youngs Drug Products Corp., 463 U. S. 60 (1983).

[54]Zauderer v. Office of Disciplinary Counsel, 471 U. S. 626 (1985).

[55]Alcohol in America at 14-18.

[56]Dunagin at 749.

[57]Jacobson, Atkins, and Hacker at 7.

[58]Muliger, "The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban" 36 Fed. Comm. L. J. 19 (1984).

messages, which were probably more of a deterrent than advertising was a promoter.[59]

In a 1972 study, Schmalensee found that advertising was a result of sales, and did not affect consumer spending.[60] Bourgeois and Barnes (1979) found that, overall, advertising was not related to per capita consumption of alcohol.[61] More empirical research is needed, but the existing data do not reflect that an advertising ban will decrease alcohol consumption. In Metromedia and Posadas, empirical considerations were recommended by dissenting Justices to substantiate the government interest and the advancement of that interest.

Part Four. If the court finds that alcoholic beverage advertising concerns a lawful activity, and is not false or misleading; that the government has a substantial interest in its regulation; and that the regulation directly advances the government interest; the court must then determine that the regulation regarding expression is not more extensive than is necessary to advance that interest.

Given the powers of the three regulatory agencies governing alcoholic beverage advertising, the F. C. C., the F. T. C., and the B. A. T. F., it seems that further legislative control would be extensive. The power of the F. C. C. is limited to license renewal. The F. T. C. wants the B. A. T. F.

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[59]Hamilton, "The Demand for Cigarettes: Advertising, the Health Scare, and the Cigarette Advertising Ban" 54 Review of Economics and Statistics 401-11 (1972).

[60]R. Schmalensee, The Economics of Advertising, Amsterdam: North-Holland Publishing Co. (1972).

[61]Bourgeois and Barnes, "Does Advertising Increase Alcohol Consumption?" 19 Journal of Advertising Research 19 (1979).

to govern alcohol advertising, and the B. A. T. F. wants Congress to issue its position. If indeed, an interest is substantial, such agency inaction might demonstrate the need for more Congressional supervision of these agencies, not the alcoholic beverage industry.

Alternatives to a total advertising ban would also include time, place, and manner restrictions, as was suggested by Justice Powell in Carey: "carefully tailored restrictions designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young."[62] MADD proposes alcoholic beverage industry self-regulation and media policing of advertising.[63] The White House calls for elimination of advertisements involving athletes and on-campus promotions, both strategies which may call the attention of young people to alcohol.[64]

Additionally, because the Twenty-first Amendment gives states the power to establish alcoholic beverage control guidelines within state borders, other strategies might better serve the government interest of reduced alcohol consumption. Most states have already opted to raise the legal drinking age to 21, and could probably further reduce consumption by increasing alcoholic beverage taxes.[65] Vigorous enforcement of criminal statutes, associated with alcohol abuse, and the establishment of limits on

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[62] Carey at 712.

[63] "Lightner urges ad self-rule" Advertising Age 133 (April 22, 1985).

[64] "White House offers Rx for alcohol ads" Advertising Age 10 (March 25, 1985).

[65] Bourgeois and Barnes at 29.

alcohol use would parallel the alternatives suggested by Justice Brennan regarding casino gambling in Posadas.[66]

Summary

Because the Supreme Court recently employed the strict scrutiny test to uphold an advertising ban on casino gambling, it is easy to speculate that proponents of an alcoholic beverage advertising ban will step up their efforts. In light of the argument that other alternatives might better serve the government interest of reduced alcohol consumption and the lack of empirical substantiation of the government interest, the 5-4 decision in Posadas may not reflect the judicial view for a ban of alcoholic beverage advertising.

Finally, industry self-regulation may avert the perceived need for an advertising ban. MADD suggested this strategy, and added that the media, too, might police advertising content. If internal enforcement of industry codes were implemented, many concerns might be abated, particularly those regarding the advertising's affects on youth consumption, over-indulgence, and dangerous uses of alcohol.

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[66]Posadas at 2985.